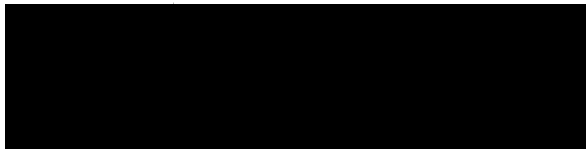




U.S. Citizenship
and Immigration
Services

134



FILE:



Office: CALIFORNIA SERVICE CENTER

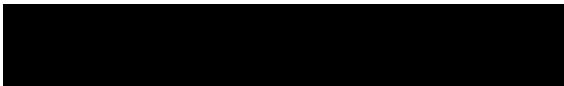
Date:

AUG 16 2006

IN RE:

Petitioner:

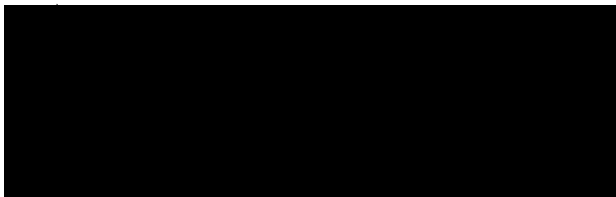
Beneficiary:



PETITION:

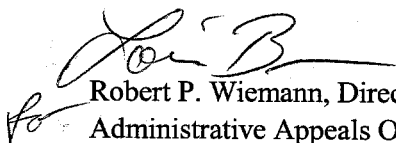
Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was revoked by the Director, California Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on motion to reopen. The motion will be granted. The previous decision of the AAO will be withdrawn. The petition will be approved.

The petitioner is private household. It seeks to employ the beneficiary permanently in the United States as a child monitor. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

On motion, counsel asserts that the beneficiary has been employed by the petitioner full-time since 1997. Counsel further states that the statements contained on the beneficiary's G-325A Biographic Data Sheet are inaccurate regarding dates of employment. Counsel submits significant evidence of the beneficiary's employment for the petitioner during 2000.

The AAO dismissed the appeal, reasoning that the petitioner had submitted insufficient evidence to overcome the fact that the beneficiary made statement(s) during her interview regarding her employment which were contradicted by statement(s) made on her 1995 Form 1040 U.S. Individual Income Tax Return and Form G-325A.

The regulation at 8 C.F.R. 103.5(a) states, in pertinent part:

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petition was revoked because the beneficiary made statements on her Form G-325A and her 1995 Form 1040 U.S. Individual Income Tax Return that were dissimilar to statements made by the beneficiary during an interview with a CIS officer. On motion, counsel dismisses these differences stating that the beneficiary was nervous and did not fully understand exactly what evidence was required. Counsel states that the beneficiary was on maternity leave at the time of her interview and was therefore, uncertain as to how to answer the questions put to her during the interview. Counsel acknowledges that some of the beneficiary's employment for the petitioner was part-time as a result of giving birth to a child. Counsel submits evidence of the beneficiary's employment in the form of doctors records dating back to 1989, tax records and W-2 Wage and Tax Statements and, an explanation regarding the difference in phone numbers, which was the result of an area code change.

The director revoked the approval of the petition because she determined that the petitioner proffered contradictory evidence in petitioning for benefits under the Act. A review of the record, however, indicates that, as counsel points out, the discrepancies contained in the record were probably harmless error and not the result of

any attempt to submit fraudulent documentary evidence. Regardless, whether or not the beneficiary worked for the petitioner, full-time, part-time, or not at all, is relevant only in the determination of the petitioner's ability to pay the proffered wage. Specifically, there is no requirement that the beneficiary have worked for the petitioner, let alone worked full-time, prior to the approval of the petition. Rather, her employment by the petitioner can be evidence of the petitioner's ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2). In this matter, however, we find that the record contains ample evidence of the petitioner's ability to pay the proffered wage over the years independent of any wages actually paid. Thus, whether the beneficiary has worked full-time for the petitioner since the priority date appears immaterial. Moreover, we find no evidence that the job offer is no longer viable. Specifically, any break in the petitioner's employment of the beneficiary appears temporary, rather than as the result of the job offer being withdrawn. Therefore, it is concluded that the petitioner has overcome the director's objection and that the petition should be approved.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has met that burden.

ORDER: The motion is granted. The previous decision of the AAO, dated July 25, 2001, is withdrawn. The appeal is sustained. The petition is approved.